No. 907



IN THE

# Supreme Court of the United States

OCTOBER TERM 1944



IN THE MATTER *of*

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

*Debtor.*

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DARRAGH A. PARK, as Chairman of a Group of Holders of Adjustment Mortgage Bonds,

*Petitioner,*

*vs.*

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, and others,

*Respondents.*

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## PETITION OF DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF THE DEBTOR'S ADJUSTMENT MORTGAGE BONDS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*of*

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*To the Honorable the Chief Justice and the Associate Justice of the Supreme Court of the United States:*

Your Petitioner is Chairman of a Group of holders of the Debtor's Adjustment Mortgage Bonds and as such has been permitted to intervene in this proceeding both in the Interstate Commerce Commission and in the District Court.

Pursuant to law and the Rules of this Honorable Court your Petitioner respectfully prays that a writ of *certiorari* issue to review an order or judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in this cause on October 31, 1944, dismissing the appeals of the Petitioner and certain other parties from an order or decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered June 30, 1944, approving a Plan of Reorganization for the Debtor certified to it on April 10, 1944, by the Interstate Commerce Commission.

## Summary Statement of the Matter Involved

This proceeding is one of the two proceedings upon which this Court on March 15, 1943, rendered its decisions commonly referred to as the *Western Pacific* case and the *Chicago, Milwaukee, St. Paul and Pacific* case interpreting Section 77 of the National Bankruptcy Act.*

This Court in this proceeding had issued its writ of *certiorari* to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered December 4, 1941, reversing an order or decree of the District Court approving a Plan of Reorganization for the Debtor, and on March 15, 1943, it rendered the decision mentioned above remanding the proceeding to the District Court for further action which Court in turn, after the determination of certain lien questions, referred the proceeding back to the Interstate Commerce Commission for further action pursuant to the mandate of this Court and to subsection (e) of Section 77 of the National Bankruptcy Act. Subsequently on April 10, 1944, but without accord-

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* *Ecker, et al.* v. *Western Pacific Railroad Corporation, et al.*, 318 U. S. 448; *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523.

ing the parties a full hearing, the Interstate Commerce Commission approved and certified to the District Court a new Plan of Reorganization for the Debtor. By order or decree entered June 30, 1944, the District Court approved the new Plan from which order and decree your Petitioner duly appealed to the Circuit Court of Appeals for the Seventh Circuit.

On October 31, 1944, on motion of certain parties in interest the Circuit Court of Appeals summarily dismissed the appeal for reasons stated in its opinion hereto annexed marked Appendix A. As appears from this opinion the Court determined adversely to the appellants without the benefit of Brief or oral argument a number of novel and difficult questions which are not covered or concluded by the decisions of this Court rendered March 15, 1943.

The reasons why the Petitioner asks that this Court issue a writ of *certiorari* to review this summary action of the Circuit Court of Appeals are the following:

On March 15, 1943, when this Court rendered the two decisions referred to above, there was pending in the Interstate Commerce Commission for further action a proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company which had been referred back to the Interstate Commerce Commission pursuant to subsection (e) of the National Bankruptcy Act after disapproval by the District Court of a Plan of Reorganization previously certified to the Court by the Interstate Commerce Commission. The legal status of that proceeding was therefore precisely the same as that of this proceeding after it came back to the Interstate Commerce Commission under the mandate of this Court.

On June 14, 1943, the Interstate Commerce Commission, without permitting the parties in interest to offer evidence of changed economic conditions which have resulted in a permanent elevation far above pre-war levels of the earn-

ing power of the properties of The Denver and Rio Grande Western Railroad Company, formulated and certified a new Plan of Reorganization which entirely eliminated its capital stock and made only approximately 10% provision for its General Mortgage Bonds—the most junior issue of Bonds corresponding generally as to character and lien to the Adjustment Mortgage Bonds of the *Chicago, Milwaukee, St. Paul and Pacific Railroad Company.* The District Court on October 25, 1943 approved the new Plan and the Railroad Company appealed from the order or decree of approval to the Circuit Court of Appeals for the Tenth Circuit. This appeal was perfected and after the filing of Briefs was set for argument and was argued at Wichita, Kansas, on November 13, 1944. During the pendency of this appeal the Interstate Commerce Commission submitted the Plan for acceptance or rejection by secured creditors of the Debtor and the Plan was rejected by one class of the creditors to which it was so submitted. On November 29, 1944, the District Court for the District of Colorado, entered an order or decree confirming the Plan notwithstanding such rejection and forthwith various parties in interest appealed from said order or decree of confirmation to the Circuit Court of Appeals for the Tenth Circuit, and by order of that Court dated January 17, 1945, the appeal is set for oral argument at Denver, Colorado, during the March, 1945, Term which begins March 12, 1945.

The new Plan of Reorganization for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company conforms in its broad outlines to the same general pattern as was used for The Denver and Rio Grande Western Railroad Company by eliminating the entire capital stock and making only partial provision (approximately 60%) for the Adjustment Mortgage Bonds.

The Petitioner submits that the junior lien creditors and stockholders of the Chicago, Milwaukee, St. Paul and

Pacific Railroad Company ought not to be foreclosed and their investments forfeited in whole or in part by a summary dismissal of their appeals by the Circuit Court of Appeals for the Seventh Circuit unless and until the Circuit Court of Appeals for the Tenth Circuit has determined the pending appeals and upheld the similar Plan which the Interstate Commerce Commission has prescribed for The Denver and Rio Grande Western Railroad Company.

For a further statement of reasons reference is hereby made to the annexed Argument of Counsel.

WHEREFORE, your Petitioner respectfully prays that a writ of *certiorari* be issued out of and under the Seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record in the cases numbered on its docket, Nos. 8658, 8659, 8660, 8661, 8662, and entitled *In re: Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor,* and that the order or judgment of the Circuit Court of Appeals for the Seventh Circuit dismissing said appeal be reversed and set aside and that said appeals be heard by this Court or be remanded for hearing by the Circuit Court of Appeals for the Seventh Circuit, or that your Petitioner be given such other or further relief in the premises as to this Court may seem proper.

FRANK C. NICODEMUS, JR.,
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January 29, 1945.

## Argument

One of the established grounds for the granting of a writ of *certiorari* and perhaps the ground most frequently recognized by this Court is a conflict of opinion between different Circuits.

Such a conflict is present here since the Circuit Court of Appeals for the Tenth Circuit is giving full consideration to an appeal presenting the same basic questions as the appeal which the Circuit Court of Appeals for the Seventh Circuit has summarily dismissed.

While there is nothing quite so unpredictable as the decision of a judicial tribunal we are confident that the Circuit Court of Appeals for the Tenth Circuit will clarify many vital questions even if it does not reverse (as the Appellants hope) the order of the District Court approving the Plan of Reorganization and refer the proceeding back to the Interstate Commerce Commission for a new Plan conforming to the law of the land. We are equally confident that the Circuit Court of Appeals for the Seventh Circuit might easily have reached a conclusion different from that which it did reach if it had permitted counsel to present orally and by Brief their views upon the many novel and difficult questions which arise in these cases.

Included among these questions are the following:

(a) Whether this Court in referring this proceeding back to the Interstate Commerce Commission intended to circumscribe the action of the Interstate Commerce Commission?

(b) Whether the Court can circumscribe the action of the Interstate Commerce Commission or whether the Interstate Commerce Commission can limit the scope of the hearing required by subsection (d) after a reference of the

proceeding back to the Commission pursuant to subsection (e)?

(c) Whether the power to fix the effective date of a Plan of Reorganization which this Court says is given to the Interstate Commerce Commission by subsection (b) can be exercised so as to alter rights of the parties as fixed by subsection (l)?

(d) Whether the Court may lawfully disapprove a Plan of Reorganization if convinced that the Interstate Commerce Commission has undervalued the Debtor's properties and has failed to give full recognition to the Debtor's capitalizable assets?

(e) Whether a lien creditor may be divested by a Plan of Reorganization of his or its vested interests in income arising *pendente lite* and duly impounded by such creditor?

These are but a few of the many important questions which ought to be settled before the drastic Plans of Reorganization now pending in the Commission and in the Courts are put into effect. We do not understand that these questions are foreclosed by the decisions of this Court rendered March 15, 1943 under Section 77 of the National Bankruptcy Act in the *Western Pacific* case and in the *Chicago, Milwaukee, St. Paul and Pacific* case. But we would be lacking in candor if we failed formally to apprise this Court that a very serious question has been raised by the Judiciary Committee of the House of Representatives as to the admissibility of the interpretation which this Court has placed upon Section 77 of the National Bankruptcy Act in the aforesaid opinions of this Court rendered on March 15, 1943. Accordingly, we respectfully refer this Court to the unanimous Report of the Judiciary Committee, No. 1615 of the 2nd Session of the 78th Congress. In view of this Report of the Standing Committee of Congress which originated and formulated

the legislation we wonder whether the whole subject of reorganization under Section 77 may not fairly be open for reconsideration on the part of this Honorable Court.

But in any event we respectfully submit that this Court either by granting or by abstaining from immediate action upon the prefixed Petition for a writ of *certiorari* should preserve the *status quo* until the Circuit Court of Appeals for the Tenth Circuit has determined the pending appeals in the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
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40 Wall Street,
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January 29, 1945.

## Appendix A

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 8658, 8659, 8660, 8661, 8662

OCTOBER TERM AND SESSION, 1944.

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| In the Matter of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor.* | Motion to Docket and Dismiss Appeals. |

October 31, 1944.

Before EVANS, MAJOR and KERNER, *Circuit Judges.*

MAJOR, *Circuit Judge.* We have for decision a motion to docket and dismiss certain appeals filed herein July 29, 1944, from an order entered by the District Court June 30, 1944, approving the modified Plan of Reorganization for the debtor railroad corporation, as certified by the Interstate Commerce Commission in its third supplemental report and order dated April 10, 1944. The reorganization proceeding was instituted by the debtor on June 29, 1935, under § 77 of the Bankruptcy Act, and in the interim has been much litigated before the Commission and the courts. The Plan originally promulgated by the Commission was ap-

proved by the District Court October 21, 1940 (36 Fed. Sup. 193). From that approval, numerous parties appealed to this court, where the Plan was in part reversed and in part affirmed (124 F. 2d 754). Our decision was reviewed by the Supreme Court, which by its opinion of March 15, 1943 (*Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523), reversed in part and affirmed in part the judgment of this court and remanded the proceeding to the District Court for action in conformity with its opinion.

The history of the Plan, together with the numerous objections which have been made to its validity, thus being so voluminously recorded, there is no occasion for any statement or discussion further than that required to dispose of the instant motion. The appeals are by the debtor and certain junior creditors and their representatives.[1] The motion to docket and dismiss is by the Group of Institutional Investors and the Mutual Savings Bank Group, referred to as senior creditors. In connection with the motion is presented a "short record," which includes the order of the Commission and the opinion and decree of the District Court (from which the appeals were taken), approving the modified Plan.[2]

Appellants have filed their several answers to the motion to dismiss, attacking the validity of the Plan in numerous respects. The basis of appellees' contention in support of the motion is that the Commission and the court acted in conformity with the opinion and mandate of the Su-

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1. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor; St. Louis Union Trust Company and Illinois State Trust Company, as trustees under Chicago, Milwaukee and Gary Railroad Company first mortgage; National City Bank of New York and William W. Hoffman, as trustees under the Debtor's adjustment mortgage; Darragh A. Park, as chairman of a group of adjustment mortgage bondholders; and Hubert F. Atwater, *et al.*, as a protective committee for the holders of adjustment mortgage bonds.

2. Subsequent to the filing of the motion to docket and dismiss, the appeals were perfected. The complete record was filed September 19, 1944, so the motion is merely one to dismiss appeals.

preme Court, and, having so acted, no reviewable question is presented. In this connection, it is urged that numerous matters sought to be raised have heretofore been decided either by the opinion of the Supreme Court or by the opinion of this court. If appellees' position in this respect be sound, it would seem to follow that the appeals should be dismissed. We do not understand that the creditor appellants take issue with this premise, but they contend that changes were made in the Plan beyond the scope of the Supreme Court's ruling. It may be that the primary question raised by the debtor is in a different category, although we think such difference is more fanciful than real, as we shall hereinafter point out. We also note that a question is raised as to the right of the court to change the Plan so as to provide for approval of the voting trustees by the court rather than by the Commission.

This brings us to a consideration of the Supreme Court's opinion. Without entering a detailed discussion of that opinion, it is sufficient to state our conviction that every feature, except two, of this complicated Reorganization Plan was approved by the Supreme Court and all controversy with reference thereto definitely laid to rest. After discussion and decision of the many objections raised, the court (page 568) stated:

> "There are, however, two objections made by the General Mortgage bonds (senior creditors) which we think have merit. The first of these relates to the dispute as to the so-called 'pieces of lines east.' * * * The second of these objections is that the General Mortgage bonds are to receive under the plan only a face amount of inferior securities equal to the face amount of their claims."

The court proceeds to discuss and decide these two objections favorably to the senior creditors. The opinion then concludes:

> "We have considered all other objections to the plan and find them without merit. But for the exceptions we have noted, we conclude that the District Court was justified in approving the plan * * *."

Thus it will be noted that, but for the two objections decided in favor of the senior creditors, every feature of the Plan was approved, not only those specifically discussed and decided but "all other objections" as well.

The first objection related to the allocation of liens and the District Court was directed (page 569) to resolve the dispute. This was done by the District Court and approved by the Commission. No question is now raised as to the propriety of the court's action in this respect.

The court (commencing on page 569) discusses the merits of the second objection and concludes, in conformity with its previous decisions, that senior creditors, where junior creditors are permitted to participate in the Plan, are entitled to be compensated for their senior rights. The court held that the senior creditors were not accorded such treatment in the instant proceeding. Then follows the language which constitutes the real heart of the instant controversy. On page 571 the court stated:

> "But neither the Commission nor the District Court considered the problem. As we have indicated, the question whether senior creditors have received 'full compensatory treatment' rests in the informed judgment of the Commission and the court. A decision on that issue involves a consideration of the numerous investment features of the old and new securities and a financial analysis of many factors. Our task is ended if there is evidence to support that informed judgment. We are not equipped to exercise it in the first instance. Nor is it our function. * * * Our conclusion on the point is that, since junior interests are participating in the plan, the Commission and the District Court should determine what the General Mortgage bonds should receive in addi-

> tion to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights."

When the proceeding found its way back to the Commission, a large amount of cash had accumulated from the operation of debtor's railroad system, and the Commission ordered the distribution of some $52,000,000 of this cash to senior creditors as compensation for the loss of senior rights which had become merged in the Plan. To do this, it was thought necessary to change the effective date of the Plan from January 1, 1939 to January 1, 1944, and such change was effected. As we understand, the senior creditors were entitled to contract interest only to the effective date of the Plan, and the cash distribution directed would be the substantial equivalent of the contract rate during the five year period created by changing the effective date. The action of the Commission in this respect was approved by the District Court.

No contention is made but that the action of the Commission, approved by the court, is supported by evidence. The essential attack upon the Commission's order is that it was without authority to change the effective date of the Plan because not within the purview of the remandment. This involves a construction of the Supreme Court's direction to the Commission and the District Court. We know of no reason why a decision in this respect cannot be made now as well as at some future date. In other words, we are unable to perceive how any further light could be shed upon this controversy by permitting the appeals to stand.

Of course, it is true no doubt, as argued by the junior creditors, that they will be injured by the payments directed to be made to the senior creditors. It appears, however, that the same argument could be made against any provision for compensating such creditors. At any rate, we

know of no way by which senior creditors could be awarded additional compensation without adversely affecting other creditors. When in a proceeding of this character the financial position of one group is enhanced, it necessarily must be at the expense of some other group. We are of the view that the Commission acted not only within the authority but under the direction of the Supreme Court. Certainly it was clothed with the implied authority to do that which was directed. The method it employed to comply with such direction was the changing of the effective date of the Plan.

In this connection, it is interesting and perhaps pertinent to note that § 77 (1) rather plainly provides that the date of filing of the debtor's petition shall be the effective date of the Plan. However, in *Ecker, et al.* v. *Western Pacific Railroad Corp., et al.*, 318 U. S. 448, the court, in response to a challenge that the Commission was without power to fix some other date, stated (page 510):

> "But we are of the opinion that the provisions of subsection (b) are sufficiently broad to empower the Commission to select the date for the institution of the reorganization."

In the instant case, the Supreme Court held to the same effect (page 546). The court was content with deciding that the Commission had the power, without discussion as to the reason for its action, and we think it may be strongly implied that the court recognized the exercise of such power as final. The court having held, notwithstanding the statutory provision referred to, that the Commission was empowered to fix an effective date, it would seem to follow that the Commission was empowered in the instant case to change the date to such time as in its judgment was necessary to meet with and carry out its direction from the court. We are inclined to the view that no reviewable question is presented, but whether so or not, we are cer-

tain that we would be compelled to hold that the Commission was empowered to make the change.

Certain other questions are raised as to other minor changes made by the Commission, necessitated by the provision adopted for compensating senior creditors. We think they need not be discussed. They fall within the same category as the Commission's change in the effective date of the Plan, and what we have said and concluded with reference to the latter provision is applicable.

The debtor resists the motion to dismiss on the ground that it was denied a hearing on the value of its property, which it contends has greatly increased since the approval of the original Plan and even since the decision of the Supreme Court. When the proceedings were referred back to the Commission after the Supreme Court's decision, the debtor petitioned the Commission to reconsider the Plan on the basis of an increase in property value. The Commission received evidence as to the debtor's earnings up to the time of the hearing, with an estimate for the remainder of 1943. The Commission refused to change the Plan, which refusal was approved by the District Court. The debtor heretofore, both before this court and the Supreme Court, has urged that changed circumstances required that the Plan be referred back to the Commission for reconsideration. In response to this contention, the Supreme Court (page 543) said:

> "We agree with the Circuit Court of Appeals that no sufficient showing of changed circumstances has been made which requires the District Court to return the plan to the Commission for reconsideration."

The Supreme Court had before it the net earnings for 1940 and 1941, which disclosed that such earnings for the latter year were almost twice as much as for the former. The debtor seeks to evade this apparently conclusive pronouncement of the Supreme Court by arguing that it is

entitled to a hearing, not on increased net earnings but on the increased worth of its assets in connection with a decreased amount of its liabilities. We think this is a distinction without any real difference, for it would appear that the increase in the value of its assets and the decrease in the amount of its liabilities were the direct result of its increased earnings. However, the Supreme Court, in its discussion of the criterion to be applied in determining value for reorganization purposes, has definitely determined that it is the earning power. The court said (page 540):

> "The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn. * * * Certainly there is no constitutional reason why earning power may not be utilized as the criterion for determining value for reorganization purposes."

The Supreme Court, in agreeing with this court that the debtor was not entitled to a further hearing because of the alleged changed situation, discusses debtor's experience during and following the first World War, and states (page 543):

> "We cannot assume that the figures of war earnings could serve as a reliable criterion for that 'indefinite future.'"

We are of the view that the District Court properly refused to refer the proceeding to the Commission for the purpose of considering further a valuation theretofore determined and approved by the Supreme Court. Conceivably a situation might arise in a proceeding of this character wherein a party might be entitled to be heard on account of a changed condition, but in view of what the Supreme Court has said in this and other cases, we think clearly that no such situation is presented. Furthermore, the debtor seeks to circumvent the test of increased net

earnings which the Supreme Court has prescribed and relies upon the alleged increased value of assets and the decreased amount of liabilities. In this connection, it is pertinent to observe that a memorandum taken from the record was handed to the court during oral argument, which discloses debtor's revenue and expenses for the years 1943 and 1944. While there was an increase in the amount of operating revenue in 1944 over the same period in 1943, there was a marked decrease in the net income for 1944, due to the greatly increased cost of operation. This situation is corroborative of the Supreme Court's prophetic discussion (pages 543-544) as to what is likely to happen in a normal year.

The modified Plan provides for the creation of a voting trust consisting of five trustees, and designate the groups or parties by whom such trustees are to be selected. It provides that upon a failure to designate by such groups or parties designation shall be made by the court. The Plan then provides, "The designation of any and of all of the voting trustees shall be subject to the approval of this Commission." This provision was inserted by the Commission for the first time. The court altered it by providing that approval of such voting trustees be by the court rather than by the Commission. It is here contended that this alleged alteration by the court requires that the Plan be sent back to the Commission, and that this court should so direct. No question is raised but that the court is as well equipped to approve such trustees as the Commission, or that any party will be aggrieved by such approval.

We have serious doubt that the Commission was authorized for the first time to insert this requirement in view of the limited scope of its authority, following the Supreme Court's opinion, heretofore discussed. Furthermore, we are doubtful if this requirement is in fact a part of the

Plan of Reorganization. Certainly its operation or execution is not dependent in any degree upon whether the trustees are approved by the court or by the Commission. It can be more aptly described, so we think, as a part of the mechanics by which the Plan is to be consummated. We are of the view that this change by the court did not alter the Plan so as to require a re-reference to the Commission. In any event, it would border on the absurd, under the circumstances presented, to send this matter back to the Commission for this alleged defect which has no bearing upon the substance of the Plan or the rights of the parties. We shall not do so.

We are of the opinion that the appeals should be dismissed. In reaching this conclusion, we are not unmindful that parties are ordinarily entitled to have their cases reviewed on the merits. We are not presented, however, with an ordinary situation; in fact, it is extraordinary. The proceeding has been pending for more than nine years. As the Supreme Court in the instant case said (page 545), "We cannot conclude that in this proceeding, * * * the interests of junior claimants have been sacrificed for speed." We are satisfied, as has so often been emphasized, that the public interest requires that there be no further delay. We think the motion to dismiss should be allowed on the ground that the modified Plan conforms to the opinion and mandate of the Supreme Court, in which event there is nothing to review. However, we recognize, as our opinion indicates, the difficulty of thus limiting our discussion. In other words, it is not easy to establish the precise boundary line between that which is in compliance and that which goes beyond. However, if the latter field has been invaded, we are satisfied that it has been concerning matters which have been so firmly lodged in the informed judgment of the Commission and the District Court that neither this court nor any other reviewing court would be authorized to substitute its judgment therefor. Under such cir-

cumstances, any further review would be little more than an idle and useless ceremony. It is hardly within the range of possibility that appellants could benefit thereby. On the other hand, the delay occasioned would prove detrimental to the public interest and prolong the goal which has long been sought, that is, the final consummation of the Plan.

The appeals are

DISMISSED.

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

DEBTOR.

DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF ADJUSTMENT MORTGAGE BONDS,

*Petitioner,*

*vs.*

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, AND OTHERS,

*Respondents.*

**MOTION OF GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP TO CONSIDER AND ACT UPON THE PETITION FOR CERTIORARI OF DARRAGH A. PARK WITHOUT FURTHER PRINTING OF THE RECORD.**

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FRED N. OLIVER,
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*Of Counsel.*

Dated February 14, 1945.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

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*Petitioner,*

*vs.*

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, AND OTHERS,

*Respondents.*

---

## MOTION OF GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP TO CONSIDER AND ACT UPON THE PETITION FOR CERTIORARI OF DARRAGH A. PARK WITHOUT FURTHER PRINTING OF THE RECORD.

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The Group of Institutional Investors and the Mutual Savings Bank Group, respondents herein, waiving service under Paragraph 3 of Rule 38, and filing at this time their brief in opposition to the petition for certiorari of Darragh A. Park, respectfully move the Court to consider and act upon said petition for certiorari without further printing of the record.

The reports and order of the Interstate Commerce Commission, the opinion of the District Court, and the opinion of the Court of Appeals which show on their face that the Commission and the court acted in strict conformity with the opinion and mandate of this Court[1] already have been printed.[2]

The brief in opposition filed herewith by these respondents shows, we submit, that the petition for certiorari is entirely lacking in substance. Yet the petitioner is attempting to postpone printing of the transcript in order to secure the very delay in the reorganization of this railroad which he seeks to accomplish by the petition for certiorari. The petition for certiorari requests this Court to preserve the *status quo* "by abstaining from immediate action" thereon "until the Circuit Court of Appeals for the Tenth Circuit has determined the pending appeals in the proceeding for reorganization of The Denver and Rio Grande Western Railroad Company." (p. 8 of Petition for Certiorari.)

The petitioner, having secured an order postponing service until March 1, 1945, notified the respondents on February 10, 1945, that he will "apply for a further Order which shall extend the time of the Petitioner for perfecting service under Paragraph 3 of Rule 38 for a period of thirty days from and after the decision of the Circuit Court of

[1] *Group of Institutional Investors et al., v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523 (March 15, 1943).

[2] The Second Supplemental Report of the Interstate Commerce Commission dated December 6, 1943 is reported in 254 I. C. C. 707; the Third Supplemental Report and Order of the Interstate Commerce Commission dated April 10, 1944 is reported in 257 I. C. C. 223; we are advised that the printed proof of the opinion of the District Court dated June 22, 1944 is being checked for typographical mistakes by West Publishing Co. and that the opinion will appear in a forthcoming advance sheet of the Federal Supplement reports; and the opinion of the Circuit Court of Appeals dated October 31, 1944 is reported in 145 Fed. (2d) 299 (advance sheet for December 25, 1944). Printed copies of all of these documents are contained in the transcript of the proceedings below which has been filed in this Court.

Appeals in the Tenth Circuit from the order approving and confirming the Commission's Plan for the reorganization of The Denver and Rio Grande Western Railroad Company."

These respondents therefore move the Court to consider and act upon the petition for certiorari without further printing of the record.

Respectfully submitted,

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FRED N. OLIVER,
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*Respondents.*

**BRIEF OF GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP IN OPPOSITION TO PETITION FOR CERTIORARI OF DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF ADJUSTMENT MORTGAGE BONDS.**

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Dated February 14, 1945.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

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**No. 907.**

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IN THE MATTER OF
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
Debtor.

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DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF ADJUSTMENT MORTGAGE BONDS,
*Petitioner,*

*vs.*

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, AND OTHERS,
*Respondents.*

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## BRIEF OF GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP IN OPPOSITION TO PETITION FOR CERTIORARI OF DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF ADJUSTMENT MORTGAGE BONDS.

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### PRELIMINARY STATEMENT.

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This brief is filed on behalf of the Group of Institutional Investors, composed of ten life insurance companies, and the Mutual Savings Bank Group, consisting of 99 mutual savings banks, whose members are large holders of bonds of the Debtor. These Groups have been parties to the various proceedings in the courts and before the Interstate Commerce Commission with respect to the reorganization

of the Debtor and, together with the Reconstruction Finance Corporation, were the petitioners in this Court upon whose petition writs of certiorari were granted and the Plan of Reorganization reviewed in this Court, culminating in the decision rendered March 15, 1943, *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523.

In that decision this Court reversed in part and affirmed in part the judgment of the Circuit Court of Appeals for the Seventh Circuit (124 Fed. (2d) 754) and directed that the matter be remanded to the District Court for proceedings in conformity with its opinion. In that opinion the Supreme Court approved the Plan of Reorganization of the Milwaukee with the exception of two items as to which it remanded for further action. First, the Supreme Court directed the District Court to determine which of the mortgages affecting the Debtor's property had a first lien upon the so-called "pieces of lines east." On the remand, the District Court adjudicated the liens and its determination required no change in the Plan in this respect. No party has ever objected to that determination. Second, the Supreme Court directed the Interstate Commerce Commission and the District Court to determine what the senior bondholders should receive, in addition to the allotment made to them of inferior securities equal in face amount to their old securities, as equitable compensation for their loss of their senior rights. As to this the Court stated:

> "As we have indicated, the question whether senior creditors have received 'full compensatory treatment' rests in the informed judgment of the Commission and the court. A decision on that issue involves a consideration of the numerous investment features of the old and new securities and a financial analysis of many factors. Our task is ended if there is evidence to support that informed judgment. We are not equipped to exercise it in the first instance. Nor is it our function." (p. 571.)

Except for these two items, the Court approved the Plan, stating:

> "We have considered all other objections to the plan and find them without merit. But for the exceptions we have noted, we conclude that the District Court was justified in approving the plan and that the Circuit Court of Appeals was in error in reversing that judgment." (p. 573.)

Thereafter, the Interstate Commerce Commission, acting on a re-reference by the District Court, held further hearings and issued its second supplemental report approving a Modified Plan of Reorganization for the Milwaukee to conform with the opinion of this Court. Petitions for further modification of the Plan were filed by various parties in interest, and the Interstate Commerce Commission, after considering these petitions, made and certified its third supplemental report and order dated April 10, 1944, wherein it approved the Modified Plan.

The District Court heard objections to the Modified Plan thus certified by the Commission, and by opinion, findings of fact, conclusions of law and decree entered June 30, 1944, approved the Plan as modified by the Commission in conformity with the opinion and mandate of this Court.

Notices of appeal to the Circuit Court of Appeals from the decree thus approving the Modified Plan were filed by the Debtor, the mortgage trustees of the Chicago, Milwaukee and Gary mortgage and the adjustment mortgage, and by the petitioner and another committee representing certain adjustment mortgage bonds. Thereupon the Group of Institutional Investors and the Mutual Savings Bank Group filed a motion in the Court of Appeals to docket and dismiss the appeals on the ground that the controlling issues had been determined by this Court, that the modifications which the Interstate Commerce Commission had made in the Plan and which the District Court had ap-

proved were wholly in conformity with the mandate of this Court and that the appeals presented no issue of substance. Before argument upon the motion to dismiss, the complete record had been filed by the appellants.

Thereupon the Circuit Court of Appeals, after hearing arguments both written and oral, rendered its opinion and order on October 31, 1944, dismissing the appeals. *In re Chicago, M., St. P. & P. R. Co.*, 145 F. (2d) 299.

On January 6, 1945, the Interstate Commerce Commission certified to the District Court the results of the submission of the Modified Plan to the affected creditors for their acceptance or rejection, pursuant to the provision of Section 77. (Certificate dated January 6, 1945, Finance Docket No. 10882.) The Certificate showed:

| Class | "Percent of total vote Accepted | Rejected |
|---|---|---|
| 1. Holders of The Milwaukee and Northern Railroad Company first mortgage bonds | 100.00 | 0 |
| 2. Holders of The Milwaukee and Northern Railroad Company consolidated mortgage bonds | 99.39<br>0.54* | 0.07 |
| 3. Holders of Chicago, Milwaukee and Gary Railway Company first mortgage bonds | 93.56 | 6.44 |
| 4. Holders of Chicago, Milwaukee and St. Paul Railway Company general mortgage bonds | 99.28<br>0.68* | 0.04 |
| 6. Holders of the debtor's fifty-year mortgage bonds | 99.25<br>0.28* | 0.47 |
| 7. Holders of the debtor's convertible and adjustment mortgage bonds | 87.88 | 12.12 |

* Acceptance on condition that claim of the Reconstruction Finance Corporation be paid in full with cash as provided for in the approved plan.

| Class | "Percent of total vote Accepted | Rejected |
|---|---|---|
| 21. Reconstruction Finance Corporation, holder of debtor's secured notes | 100.00 | 0 |
| 22. Federal Emergency Administration of Public Works, holder of debtor's secured notes (assigned to Reconstruction Finance Corporation) | 100.00 | 0 |
| 31. Holders of all other claims, obligations and liabilities not otherwise specifically classified, which have been allowed by the Special Master or the court | 99.82 | 0.18" |

The District Court has set a hearing for February 20, 1945 to determine whether the Modified Plan shall be confirmed and to determine the means by which said Plan, if confirmed, shall be put into effect and carried out.

These respondents oppose the granting of a writ of certiorari on the grounds that (1) the Modified Plan conforms strictly to the opinion and mandate of this Court; (2) the informed judgment of the Interstate Commerce Commission and the District Court is supported by the evidence; and (3) the decision below is not in conflict with the decision of any other Circuit.

## I.

### The Modified Plan Conforms Strictly to the Opinion and Mandate of This Court.

The undisputed fact that the Modified Plan conforms to the opinion and mandate of this Court in 318 U. S. 523 is a conclusive reason, we submit, why the petition for certiorari should be denied.

## II.

**The Informed Judgment of the Interstate Commerce Commission and the District Court Is Supported by the Evidence.**

In its opinion of March 15, 1943 this Court stated that "the question whether senior creditors have received 'full compensatory treatment' rests in the informed judgment of the Commission and the court."[1] The transcript of the further hearings before the Interstate Commerce Commission on the re-reference shows the overwhelming extent to which the modifications made in the Plan to conform it to the mandate of this Court are supported by the evidence. The holding of this Court, therefore, is conclusive: "Our task is ended if there is evidence to support that informed judgment."[2]

In this connection it should be noted that the transcript filed by the petitioner does not contain any of the evidence taken before the District Court at the hearings which resulted in its approval of the Modified Plan. Nor does the transcript contain any of the evidence taken at the hearings before the Interstate Commerce Commission in connection with the original Plan. All of this evidence was filed in the Court of Appeals on September 19, 1944 and was considered by that court in reaching its judgment, the court stating:

> "Subsequent to the filing of the motion to docket and dismiss, the appeals were perfected. The complete record was filed September 19, 1944, so the motion is merely one to dismiss the appeals."[3]

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[1] *Group of Institutional Investors et al.*, v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523, 571.

[2] Id.

[3] *In re Chicago, M., St. Paul & P. R. Co.*, 145 Fed. (2d) 299, 301 (C. C. A. 7, October 31, 1944).

With the transcript thus incomplete, it would be presumed that the judgment of the Interstate Commerce Commission and the District Court is supported by evidence, even if the part of the evidence which is included in the transcript filed by the petitioner did not, as it does, fully support the judgment.[1]

## III.

### The Decision Below Is Not in Conflict With the Decision of Any Other Circuit.

In view of the fact that the Modified Plan conforms to the mandate of this Court, and the informed judgment of the Interstate Commerce Commission and the District Court is supported by the evidence, any conflict with the decision of another Circuit would be unimportant here. But, in any event, there is no conflict. The petitioner merely hopes that some conflict may develop, although he is very indefinite about the possibility. He contends that the decision below might conflict with the decision of the Tenth Circuit, if that court should upset the approved plan for another railroad on a pending appeal, saying that the plans for the two railroads conform in "broad outlines to the same general pattern." (Petition for Certiorari, p. 4.)

The petitioner also refers to the so-called Hobbs bill and the Report of the Judiciary Committee of the House of Representatives thereon and asks whether "the whole subject of reorganization under Section 77 may not fairly be open for reconsideration on the part of this Honorable Court." (p. 8.) Even that bill, however, provides that it shall not apply to pending reorganizations, such as the Milwaukee, where "the plan has been voted on and accepted

[1] *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 283 (1934).

by the requisite percentage of creditors of each class prior to the effective date" thereof.[1]

Neither the asserted possibility of conflict among the Circuits or of new legislation affords any support whatever for the petitioner's request that this Court "preserve the *status quo*" by "abstaining from immediate action". (Petition for Certiorari, p. 8.)

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We pray that the petition for certiorari be denied.

Respectfully submitted,

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[1] 78th Congress, 2nd Session, H. Rep. No. 1615, p. 7; 79th Congress, 1st Session, H. Rep. No. 48, p. 7.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

## No. 907

IN THE MATTER OF

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF ADJUSTMENT MORTGAGE BONDS,
*Petitioner,*

vs.

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, AND OTHERS,
*Respondents.*

## BRIEF OF GROUP OF ADJUSTMENT MORTGAGE BONDHOLDERS IN OPPOSITION TO PETITION.

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Midwest Law Printing Co., 340 W. Huron St., Chicago

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*Respondents.*

## BRIEF OF GROUP OF ADJUSTMENT MORTGAGE BONDHOLDERS IN OPPOSITION TO PETITION.

### STATEMENT.

The other respondents, the Institutional Groups, moved for a disposition of the petition without printing the record, and waived formal service of the petition and record. These respondents likewise waive formal service of the petition and record and request the disposition of the case without printing the record for the reason that this will avoid delay and the pertinent matters appear in printed form in the various official publications.

### Opinion Below.

The opinion of the Circuit Court of Appeals appears in 145 F. (2d) 299. The Second and Supplemental Report of the Interstate Commerce Commission appears in 254 I. C. C. 707 and the Third and Supplemental Report of the Commission appears in 257 I. C. C. 233.

## REASONS FOR THE DENIAL OF THE PETITION.

These respondents are a group of holders of Adjustment Mortgage Bonds who are opposed to the allowance of the writ at the instance and request of the petitioners who are also holders of Adjustment Mortgage Bonds.

These respondents were the only group which appeared at the hearings before the Interstate Commerce Commission, the District Court, the United States Circuit Court of Appeals, and before this Court, and endeavored to obtain better treatment for the class who owned these bonds. Being dissatisfied with the Plan, they appealed to the United States Circuit Court of Appeals for the Seventh Circuit and were successful in their appeal and obtained a *reversal* (124 F. (2d) 754). This Court reversed the decision below and approved the plan insofar as it affected the class of the Adjustment Mortgage Bonds. It remanded the case in order to allow to some senior creditors additional compensation, which of course had to be at the expense of the class of the Adjustment Mortgage Bonds which was the only junior bond issue which participated in the reorganized company (318 U. S. 523). In order to obtain further benefits for the class, these respondents filed a petition for rehearing and brought to the attention of this Court the changed economic conditions. They attached to the petition three exhibits showing the finan-

cial cash position and improved valuation as reflected by the books and records as of January 30, 1943. This Court, however, denied the rehearing (318 U. S. 803).

After the decision of this Court became final upon the denial of the rehearing, the new group consisting of the petitioners, was organized as a Protective Committee, and this new group now seeks a review of the same subject matter which was presented to this Court by these respondents.

The decision of this Court created a dilemma. On the one hand this Court affirmed the plan which adjudicated and "fixed" the rights of the holders of the Adjustment Mortgage Bonds and their pro rata share under the new capital structure. On the other hand, it held that the senior creditors were entitled to additional compensation, which could only be taken out of the interest allotted to the holders of the Adjustment Mortgage Bonds. This created the puzzle how to pay additional compensation to the senior creditors without changing the capital structure, and at the same time distribute the new securities to the holders of the Adjustment Mortgage Bonds without disturbing their rights under the plan which this Court approved as to them. The problem was solved when the Institutional Groups presented a Modified Plan which was satisfactory to them and without prejudice to the class of the Adjustment Mortgage Bondholders. In substance, it changed the effective date so that in lieu of giving them interest coupons from January 1, 1939, to January 1, 1944, they were given the cash instead, and their new interest will commence January 1, 1944. This in no way changed the position of the holders of the Adjustment Mortgage Bonds, and the respondents seized the opportunity to *support* this plan and participated before the Commission as

well as before the District Court in urging the adoption of this plan. The petition should therefore be denied for the following reasons:

## I.

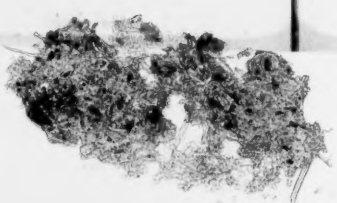
**There are no sound reasons for the allowance of the writ.**

While several groups were dissatisfied with the approval of the plan and appealed to the United States Circuit Court of Appeals from the order approving the plan, the petitioners were *deserted* by the other appellants.*

The only reason which petitioners urge for the allowance of the writ in their petition (p. 6) is that the decision in the instant case *might* conflict with the decision which *may* be rendered by the Tenth Circuit in another reorganization case which the petitioners hope to be in conflict with the decision in the instant case. We know of no authority for the issuance of a writ based on a prophetic assumption that another court may render a decision which would conflict with the decision sought to be reviewed.

Respondents did not join in the motion of the Institutional Groups to dismiss the appeal in a summary manner because they were of the opinion that some of the other groups were entitled to a review on the merits. Now that the other groups have abided by the decision, we are convinced from a study of the opinion that the

* The appellants who did not join in the petition for the writ are (1) the Debtor, (2) the trustee under the Chicago, Milwaukee & Gary Railroad Company first mortgage, (3) the trustee of the Adjustment Mortgage Bonds, and (4) the committee for holders of the Adjustment Mortgage Bonds represented by Hubert F. Atwater.



Court of Appeals properly dismissed the appeal of the petitioners.

None of the points which were contained in the "statement of points" relied on are even mentioned in the petition. These points were: (1) the alleged error to consider fundamental changes in economic conditions; (2) failure to pay to the Adjustment Mortgage Bondholders 100% of principal and accrued interest; (3) an attempt to unlawfully exercise permanent managerial control by the Interstate Commerce Commission; (4) approval of the plan wherein the capitalization of estimated future earnings is substituted for the elements of value; and (5) failure to meet requirements of sub-sections (b), (c) and (e) of section 77. All of these points were disposed of on the previous appeal, and therefore the Court of Appeals was justified in disposing of the appeal of these petitioners in a summary manner.

1. Point (1), the alleged error in not requiring the Interstate Commerce Commission to hear and consider the proof of fundamental changes in economic conditions, was disposed of by this Court in its original opinion as well as by its denial of the petition for rehearing filed by these respondents (318 U. S. 803). The petition for rehearing *urged* among other things the changed economic conditions now urged by these petitioners. The exhibits attached to the petition have reflected the changed conditions up to and including January 30, 1943. The denial of the petition constituted a determination of the point now urged by the respondents.

A similar contention was urged in the reorganization of the *New York, New Haven & Hartford Railroad Co.* and was held *adversely* by the United States Circuit Court of Appeals for the Second Circuit in its opinion

rendered January 2, 1945, not yet published; Case No. 107. (See C. C. H. Reports, par. 55,083).

In discussing the proposition that the capital structure should be changed by reason of the changed economic conditions, and that the Court erred in not transmitting the case to the Interstate Commerce Commission to consider the effect of these changes, and in holding adversely to the contention, the Second Circuit said:

> "It is for the informed judgment of the Commission rather than for the courts to determine the sufficiency of any cash revenue to meet the uncertainties ahead. Consequently we find no error in the District Court's refusal either to recommit the plan to the Commission or to delay reorganization until the probable extent and duration of war earnings can be more accurately determined, or to issue stock warrants to represent an equity which may develop in the future and does not presently exist. Similar contentions were refused in the *Western Pacific* & *Milwaukee* cases, *supra*. See also *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 517."

This Court said in the cases cited by the Second Circuit, *I. C. C.* v. *Jersey City*, 222 U. S. 503, 517:

> "We have rejected the plea of railroad stockholders that events subsequent to approval of a reorganization plan of a very similar character to those alleged here, require its return for reconsideration. *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523, 542-44; *Ecker* v. *Western Pac. R. Co.*, 318 U. S. 448, 506-09.
>
> "The rule that petitions are rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. *United States ex rel. Maine Potato Growers Assn.* v. *Interstate Commerce Commission*, 88 F. (2d) 780,

784, cert. denied, 300 U. S. 684; *Mississippi Valley Barge Line Co.* v. *United States*, 4 F. Suppl. 748; *Union Stock Yards Co.* v. *United States*, 9 F. Supp. 864, 873; *American Commission Co.* v. *United States*, 11 F. Supp. 965, 972; *R. C. A. Communications* v. *United States*, 43 F. Supp. 851, 858."

2. Point (2), the alleged error of the failure to make provision for 100% of the principal and accrued interest on the Adjustment Mortgage Bonds, was urged by these respondents before this Court in their brief on the previous appeal (pp. 7-16) and was *decided adversely by this Court* when it held that this group was not entitled to the accrued interest (318 U. S. 523, 573).

3. Point (3), the alleged error of the attempt of the Commission to unlawfully exercise permanent managerial control, is wholly devoid of merit because the District Court denied the Commission any right to approve the personnel of the voting trustees, and this was sustained by the Court of Appeals. Petitioners cannot complain from a decision which was *favorable to them*.

4. Point (4), the alleged error in approving the modified plan wherein the capitalization of estimated future earnings is substituted for the elements of value, was fully discussed in the opinion and it was clearly shown that the point is without merit. In disposing of a similar contention in the reorganization of the *New York, New Haven & Hartford Railroad Company*, in the opinion rendered January 2, 1945, by the Second Circuit, *supra*, the Court said:

> "Recent opinions of the Supreme Court in the *Western Pacific* and *Milwaukee* cases, 318 U. S. 448 and 523, make plain that the determination of the amount and character of the capitalization of the re-

> organized railroad and the making of valuations upon which the capitalization depends are functions of the Commission which may be reviewed by the courts only to the limited extent of seeing that the Commission has observed legal standards."

This Court has *passed upon the legal standards* employed by the Commission and the question is no longer debatable.

5. Point (5), the alleged failure to meet requirements of sub-sections (b), (c) and (e) of section 77 was disposed of by this Court when it approved the plan, subject to the remandment for minor modifications.

In view of the review which was limited to the points urged in the "statement of points", the Circuit Court of Appeals properly disposed of the matter when it dismissed the appeal, because all of the matters were adjudicated by this Court.

## II.

**The additional compensation to the senior creditors was in conformity with the mandate of this Court, and the petitioners who did not appeal on the ground that the additional compensation was excessive are in no position to complain.**

Petitioners did not appeal from the original plan which was approved by the District Court. *They were evidently satisfied with that plan.* The modified plan does not change the position of this class and, in fact, they were allotted an *increase* in the common stock. They have no cause to complain.

This Court held that the senior creditors were entitled to additional compensation at the expense of the only

junior class, the Adjustment Mortgage Bonds, who were allotted common stock in exchange for their bonds. No evidence was offered by the petitioners tending to show that the additional compensation allowed to the senior creditors was excessive. They did not urge in their "statement of points" that the evidence did not justify the additional compensation, nor did they urge among their points that the effective date under the modified plan was unfair, unreasonable or prejudicial to the interest of this class. While they complain in their Brief of the effective date (p. 7) it is not mentioned in their "statement of points" nor is it mentioned in their petition.

The distribution of the cash does not mean that the senior securities will receive additional cash as compensation, as pointed out in the opinion (145 F. (2) 299, 300). By the change in the effective date, they will obtain cash in lieu of the accumulated interest which would be payable in any event, even if the change as not made. It is a change by the substitution of cash in lieu of the issuance of new interest coupons which would be payable out of the same cash which is held in the treasury.

Under the "effective date" of the prior plan, the new securities would be issued as of January 1, 1939. The new First Mortgage Bonds bear interest at 4%, and the new General Mortgage Bonds bear interest at 4½%. All of the interest would be past due on the date of this issuance, and to avoid a default they would have had to be paid upon their issuance. It is evident, therefore, that whether interest is paid under the "effective date" of January 1, 1939, or the "effective date" of January 1, 1944, it would be paid in any event out of the cash on hand. Under no theory, therefore, would the Adjustment

Mortgage Bondholders (who stand as common stockholders under the approved plan) be materially affected as to the payment. If by the cash payment the senior securities receive in part the "additional compensation", according to their views, and the Adjustment Mortgage Bonds are not materially affected thereby, there is no reason why this class shall oppose the modified plan, and this Group therefore favored its adoption.

The change in the "effective date" from January 1, 1939, to January 1, 1944, is a change in the proper direction. It would be highly contrary to all reorganization principles to issue securities in 1945 as of January 1, 1939, with interest coupons that are past due, which may present the problem that the past due interest coupons are entitled to the payment of interest from the respective due dates. This would be avoided by the change in the "effective date". It would prevent the issuance of securities which on the face thereof would be in default at the date of their issuance under a plan bearing the approval of the Commission and the Court. Additional reasons appear in the report of the Commission in the Reorganization of the New York, New Haven & H. R. Co., 254 I. C. C., pp. 72-73.

The change in the "effective dates" was not jurisdictional. The Commission reacquired the jurisdiction when the case was remanded to it. The change in the "effective date" has not changed the capital structure. The Commission has held in numerous cases that it is proper to change the "effective date" even after it approved a reorganization plan when it reacquired jurisdiction on the failure to obtain the complete approval of its plan from the Court. (Florida East Coast Railway Reorganization, 252 I. C. C. 731; Denver & Rio Grande Western Railroad

Reorganization Finance Docket No. 11,002, June 14, 1943.) The right of the Commission to make changes was upheld in the decision of the Second Circuit of January 2, 1945, in the Reorganization of the *New York, New Haven & Hartford Railroad Co.*, not yet officially reported (Case No. 107, *supra*).

Not having raised the point that the additional compensation was not justified by the evidence, or that it was unfair and unreasonable, or that the plan is unfeasible, there was nothing to review on the appeal of the petitioners, except the fine points that we have discussed above, which were all adjudicated and foreclosed by the opinion and mandate of this Court.

Even if the Tenth Circuit should decide that the Commission was without authority to change the effective date, this point is unavailable to the petitioners because they did not raise this issue in their "statement of points". No matter how the Tenth Circuit will decide the case, it cannot conflict with the opinion in the instant case insofar as it relates to these petitioners. Therefore the application for the writ should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 907

IN THE MATTER
of
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

*Debtor.*

DARRAGH A. PARK, as Chairman of a Group of Holders of Adjustment Mortgage Bonds,

*Petitioner,*

*vs.*

GROUP OF INSTITUTIONAL INVESTORS and MUTUAL SAVINGS BANK GROUP, and others,

*Respondents.*

## ANSWER OF PETITIONER TO THE MOTION AND BRIEF, EACH DATED FEBRUARY 14, 1945, OF THE GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP

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February 26, 1945.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 907

In the Matter

of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

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*vs.*

GROUP OF INSTITUTIONAL INVESTORS and MUTUAL SAVINGS BANK GROUP, and others,

*Respondents.*

## ANSWER OF PETITIONER TO THE MOTION AND BRIEF, EACH DATED FEBRUARY 14, 1945, OF THE GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP

The Motion and opposing Brief filed by the above named respondent Groups waiving service under Paragraph 3 of Rule 38 and asking this Court to consider and act adversely upon our Petition for *certiorari* without further printing gives a very incomplete and distorted picture.

Anyone reading this Motion would assume at once that it had been conceived in compliance with Paragraph 8 of Rule 38.

This Court is entitled to the facts.

Immediately after filing the Petition in this Court the petitioner's counsel applied to counsel for the respondent Groups for a stipulation under Paragraph 8 of Rule 38 which would eliminate from the printed record as in the category of non-essential matter everything certified by the District Court except "the reports and Order of the Interstate Commerce Commission and the opinion and decree of the District Court" which the respondent Groups had represented to the Circuit Court of Appeals to be the "basic" parts of the record certified by the District Court.

The respondent Groups not only declined so to stipulate but insisted on the printing of a great mass of immaterial matter and even complained that the record certified to this Court by the Circuit Court of Appeals was itself incomplete; whereupon, counsel for the petitioner wrote counsel for the Group of Institutional Investors as follows:

> "Enclosed is copy of an Order signed by Mr. Justice MURPHY extending the time of the Petitioner to perfect service under Paragraph 3 of Rule 38 of the Rules of the Supreme Court to March 1, 1945.
>
> "March 1, 1945 was fixed as the expiration date upon the assumption that you would obey the mandate of Paragraph 8 of Rule 38 and stipulate to omit from the printed record all matter not esesntial to a consideration of the questions presented by the Petition for the writ of *certiorari*.
>
> "This you have failed to do.

"Instead of stipulating to exclude all matter except 'the reports and order of the Interstate Commission and the opinion and decree of the District Court' which according to your representations to the Circuit Court of Appeals 'constitute the basic parts of the "short record" ' and 'show on their face that the District Court and the Interstate Commerce Commission acted in strict conformity with the opinion and mandate of the Supreme Court (318 U. S. 523)' you now insist on printing the elaborate transcript of the hearings in the Interstate Commerce Commission on July 20 and July 21, 1943.

"This transcript includes long arguments of counsel and evidence and other material relating to protracted controversies between the senior creditors whom you represent and the General Mortgage Bonds not included in your Group and known as the 'University Group of General Mortgage Bonds.' This transcript was not a document which you deemed essential in securing from the Circuit Court of Appeals a dismissal order which we seek to review.

"In this situation I think I am fairly entitled to apply to the Supreme Court of the United States for a further Order which (a) shall extend the time of the Petitioner for perfecting service under Paragraph 3 of Rule 38 for a period of thirty days from and after the decision of the Circuit Court of Appeals in the Tenth Circuit from the order approving and confirming the Commission's Plan for the reorganization of The Denver and Rio Grande Western Railroad Company, and (b) shall require that all expenses of printing the record be charged against the Group for whom you appear."

Upon receipt of this letter (but before any printing was undertaken) counsel for the Institutional Investors advised the Clerk of this Court that they would not relax their printing requirements and would oppose any further exten-

sion of time for compliance with Paragraph 3 of Rule 38. When this information was communicated to counsel for the Petitioner time was of the essence and accordingly authority was immediately given and funds were provided for all of the unnecessary printing exacted by the respondent Groups. This printing was well under way when the respondent Groups filed the motion to dispense with all printing and to accelerate consideration of the Petition in the hope as seems obvious of securing a denial of the writ before the Circuit Court of Appeals in the Tenth Circuit renders a crucial decision on the appeals in the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company. Since their motion to eliminate wasteful printing comes too late to serve a constructive purpose we think a conspicuously proper case is presented for charging the cost of all printing against these two respondent Groups in accordance with the spirit of Paragraph 8 of Rule 38.

We do not oppose prompt consideration of our Petition.

We do, however, urge that no adverse action be taken until the Circuit Court of Appeals in the Tenth Circuit renders its decision upon the pending appeals from the Order and Decree approving and confirming the Plan for the reorganization of The Denver and Rio Grande Western Railroad Company. *These appeals are set for final argument at Denver on March 13, 1945, and since the major underlying questions were rather fully argued at Wichita, Kansas, on November 13, 1944, an early decision which the respondent Groups seem so patently to dread may reasonably be expected.*

In addition to this very critical case in the Tenth Circuit an equally important case presenting the same basic questions, all of them questions of widespread interest and

national importance, is pending in the Circuit Court of Appeals in the Eighth Circuit on appeals from an Order or Decree approving a Plan for the reorganization of St. Louis Southwestern Railway Company.

The reorganization Plans for these two properties are of the same general pattern and are subject to the same basic infirmities as the Plan for the reorganization of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. We wish here to feature only one point: all of these Plans were formulated in an economy which has ceased to exist and may not recur within the lifetime of any person now living. By reason of the changed economy the Plans can readily be shown no longer to be fair and equitable or to comply with Section 77.

We reproduce as Appendix A hereto the five major points presented to the Circuit Court of Appeals in the Eighth Circuit in a Brief dated January 26, 1945, filed by counsel for the Southern Pacific Company. It will be observed that here the dominant note is the fundamental change in economic conditions; and this, we think, the Circuit Court of Appeals in the Seventh Circuit failed to grasp in its true significance when in dismissing the Petitioner's appeal that Court said:

> "It is hardly within the range of possibility that Appellants could benefit thereby."

On the contrary we think it hardly within the range of possibility that the Petitioners would fail to secure 100% treatment instead of approximately 60% treatment for the Adjustment Mortgage Bonds if this proceeding is sent back to the Commission with a direction that effect be given to existing economic conditions. We think such a revision of the Plan would be imperative as the result of numerous factors, only one of which we will now emphasize; this single factor is the revolutionary change since

the decision of this Court rendered March 15, 1943, in rates for the hire of money.

All three of the Plans we are now considering were formulated upon the theory (perhaps then a correct theory) that money secured by a senior rail lien was worth not less than 4%. Accordingly all three of these Plans provides for a 4% First Mortgage although today 3% is closer to a prevailing rate which is continuing to decline to even lower levels. If recognition is given to this single factor at least 25% more income can be made to flow through to junior lienors. We attach hereto as Appendix B a list of recent refunding operations showing in each case interest savings approximating if not exceeding 25%. This is but one phase of a new economy which renders these three Plans (and all others on the same pattern) obsolete.

Would it not be morally wrong to construe the mandate of this Court as permitting, much less requiring, the Interstate Commerce Commission and the District Court to blind themselves to the fact that the Plan for the Debtor's reorganization has ceased to be fair and equitable and to comply with the requirements of Section 77? We think this Court will find the answer in the time honored maxim that: "Equity abhors a forfeiture." Perhaps this Court may spell out the same answer in the following extract from the dissent of the late Joseph B. Eastman in the proceeding for the reorganization of St. Louis Southwestern Railway Company. Referring to the manifestation as early as 1941 of greatly increased earning power Chairman Eastman said:

> "While I agree that such earnings, produced by the extraordinary conditions created by the national defense program, cannot be regarded as a sound criterion for the future, nevertheless they may well give pause for reflection before a reorganization plan is approved which wipes out all of the existing

> stock and part of the existing indebtedness. Furthermore, they show that a delay in reorganization now will not involve the constant accumulation of claims for accruing and unearned interest, which has been so serious a consequence of delay in the past."

In the light of all of the foregoing and in view of the fact that a full record is being printed through the insistence of the respondent Groups we respectfully make the following suggestion:

That this Court forthwith through its issue of the *writ* of *certiorari* remand this proceeding to the Circuit Court of Appeals in the Seventh Circuit with directions to reinstate and to hear the merits of the appeals which it dismissed by its Order of October 31, 1944.

While those appeals are being matured for argument the Circuit Courts of Appeal in the Tenth Circuit and the Eighth Circuit may be expected to decide the questions presented to them in the proceedings for the reorganization of The Denver and Rio Grande Western Railroad Company and St. Louis Southwestern Railway Company. It may well be that all three Circuits will be in accord as to the proper disposition of these substantially identical cases; if so that in all probability would end the matter. If a conflict should arise this Court may then wish to say the final word.

All of which is most respectfully submitted.

FRANK C. NICODEMUS, JR.,
*Attorney for Darragh A. Park, as Chairman of a Group of Holders of Adjustment Mortgage Bonds, Petitioner,*
40 Wall Street,
New York 5, N. Y.

February 26, 1945.

[APPENDICES FOLLOW]

# APPENDIX A

## Major Points in Brief of Southern Pacific Company filed in United States Circuit Court of Appeals for the Eighth Circuit on appeals from Order approving a Plan of Reorganization for St. Louis Southwestern Railway Company.

### ARGUMENT.

### I.

It has been authoritatively established that a court in determining whether it should approve a plan of reorganization for a railroad, certified by the Commission under § 77 of the Bankruptcy Act, Title 11, U. S. C. A. § 205, should consider the conditions existing at the time of its decision and determine whether the change in condition, since the action of the Commission has been so great as to require the plan to be returned to the Commission for reconsideration.

### II.

An appellate court, in determining whether conditions have changed since the certification of a plan by the Commission so as to require the reversal of a judgment below approving the plan, may properly consider:

(a) Any matter before the District Court set forth in the printed record;

(b) Any matter which the Court below was bound to notice, as if contained in the record;

(c) Any matter occurring since the decision below presented by concession of counsel or by any satisfactory evidence;

(d) Matters judicially noticed as within the field of common knowledge.

The facts upon which we shall rely in this brief are properly before this Court under one or more of the branches of the above statement.

## III.

A. By the criteria applied by the Commission, the Debtor was insolvent when the Commission rendered its reports herein. Applying the same criteria at this time, the Debtor is solvent by a substantial margin. This is true because the sum of (1) the value of the Debtor's property as found by the Commission, (2) increase in net current assets after the Commission's reports, (represented by cash and Government securities), and (3) other Government obligations so accumulated, now exceed the sum of all the Debtor's liabilities. If the increase in other valuable assets occurring after the Commission's reports are also considered, the present margin of solvency is even greater.

B. The restoration of Debtor's solvency was caused by phenomenal earnings of the Debtor, occurring after the Commission's reports and not anticipated by the Commission.

C. The great change in the financial condition of the Debtor has been reflected in the increase in the prices of the Debtor's securities. Five- and six-fold increases in the prices of the Debtor's junior bonds subsequent to the Commission's reports corroborate the appellant's view that the financial situation of the Debtor has changed completely since the Commission's reports.

## IV.

Where the sum of a debtor's railroad properties as valued by the Commission and its accumulation of cash or the equivalent exceed its known liabilities, the Commission will not find and a court will not affirm a finding that the corporation is insolvent or that the equity of the stockholders has no value but, to the contrary, recognition will

be given in a plan of reorganization to the stock interests. This test has been stated by the Commission and by the courts. Where the assets were sufficient for that purpose, stock interests have been recognized in Section 77 reorganizations of railroads. There is nothing in Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445, Case v. Los Angeles Lumber Co., 308 U. S. 106, Consolidated Rock Co. v. Du Bois, 312 U. S. 510, Ecker v. Western Pacific R. Corp., supra, Group of Investors v. Milwaukee R. Co., supra, or any other authoritative decision, which prevents the recognition of stockholder interests in a railroad undergoing reorganization where the assets at a fair valuation exceed the liabilities.

## V.

No sound reason may be advanced for ignoring the present solvent condition of the Debtor. Arguments by appelees to this effect will be found upon examination to be inadmissible attacks upon the findings of the Commission, as to the value of the Debtor's properties at the time of such valuation, or as to the extent of Debtor's liabilities, or to be without factual foundation.

## VI.

The gain in assets, earnings and prospects of the Debtor has been exceptional and well ahead of the average of the industry. A line of demarcation has been drawn by the Commission and courts in regard to solvency or insolvency of railroads in reorganization, and many railroads have been found to fall short of solvency. These decisions, upon different fact situations, are not inconsistent with finding the Debtor to be solvent, upon its fact situation, so long as the same standard of solvency is applied. In none of the Section 77 railroad reorganizations decided by the United States Supreme Court or a Circuit Court of Appeals has the appellate court dealt with a railroad which was solvent at the time of its decision.

## APPENDIX B

**Statement showing changes in interest rates reflected by recent refinancings of railway lien indebtedness.**

| *Name* | *Date of Refinancing* | *Interest rate of old issue* | *Interest rate of new issue* |
|---|---|---|---|
| Chicago, Burlington and Quincy RR. Co. | Aug 1-Dec. 1, 1944 | 4–5% | 3½%<br>1½%<br>3¾% |
| Chicago Union Station Company | July 1, 1944 | 3¾% | 2⅞% |
| Erie Railroad Company | Oct. 1, 1944 | 3¾–4% | 3¼% |
| Great Northern Railway Company | July 1, 1944 | 4–4¼% | 3⅛–3½% |
| Louisville and Nashville Railroad Company | Oct. 1, 1944 | 3½–5½% | 3⅜% |
| Pennsylvania Railroad Company | Jan. 1, 1945 | 4½% | 3⅛% |
| Pere Marquette Railroad Company | Mar. 1, 1945 | 4–5% | 3⅜% |
| Union Pacific Railroad Company | Oct. 1, 1944 | 4% | 3% |
| Wabash Railroad Company | Feb. 1, 1945 | 4% | 3¼% |
| Washington Terminal Company | Feb. 1, 1945 | 3½–4% | 2⅝% |

IN THE

# Supreme Court of the United States

OCTOBER TERM 1944



No. 907

IN THE MATTER
*of*
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
*Debtor.*

DARRAGH A. PARK, as Chairman of a Group of Holders of Adjustment Mortgage Bonds,
*Petitioner,*
*vs.*
GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, and others,
*Respondents.*

## MOTION FOR LEAVE TO FILE OUT OF TIME UNDER RULE 33 OF THE RULES OF THE SUPREME COURT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Pursuant to Rule 33 of the Rules of the Supreme Court the Petitioner hereby applies for leave to file the annexed Petition for rehearing notwithstanding the expiration of the twenty-five day period prescribed in Rule 33 of the Rules of this Court. The reason why the Petition for rehearing was not filed within that period is that the decision of the United States Circuit Court of Appeals in the Tenth Circuit referred to in said Petition was not released until after that period had expired and the Petitioner was not informed until June 6, 1945 that a Petition for *certiorari* would be filed in that proceeding.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
*Attorney for Darragh A. Park, as Chairman of a Group of Holders of the Debtor's Adjustment Mortgage Bonds,*
40 Wall Street,
New York 5, New York.

June 7, 1945.

IN THE

# Supreme Court of the United States

OCTOBER TERM 1944

No. 907

IN THE MATTER

*of*

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

*Debtor.*

DARRAGH A. PARK, as Chairman of a Group of Holders of Adjustment Mortgage Bonds,

*Petitioner,*

*vs.*

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, and others,

*Respondents.*

## PETITION FOR REHEARING PURSUANT TO RULE 33 OF THE RULES OF THE SUPREME COURT

FRANK C. NICODEMUS, JR.,
*Attorney for Darragh A. Park, as Chairman of a Group of Holders of the Debtor's Adjustment Mortgage Bonds,*
40 Wall Street,
New York 5, New York.

IN THE

# Supreme Court of the United States

OCTOBER TERM 1944

No. 907

IN THE MATTER

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

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*Petitioner,*

*vs.*

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, and others,

*Respondents.*

## PETITION FOR REHEARING PURSUANT TO RULE 33 OF THE RULES OF THE SUPREME COURT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

On January 31, 1945 this Petitioner applied to this Court for a writ of *certiorari* to review a decision of the United States Circuit Court of Appeals in the Seventh Circuit dismissing an appeal duly taken from an Order or Decree of the District Court for the Northern District of

Illinois, Eastern Division, which approved a Plan of Reorganization for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Plan of Reorganization which was so approved had been certified to the District Court by the Interstate Commerce Commission *after* the decisions of this Court under Section 77 of the National Bankruptcy Act rendered March 15, 1943.*

A writ of *certiorari* was asked by this Petitioner on the basic ground that an identical appeal had been entertained by the Circuit Court of Appeals in the Tenth Circuit from an Order or Decree of the District Court for the District of Colorado approving a Plan of Reorganization for The Denver and Rio Grande Western Railroad Company. This Plan of Reorganization also had been certified to the District Court by the Interstate Commerce Commission *after* the above mentioned decisions of this Court rendered March 15, 1943.

Our view then was that the refusal of a Circuit Court of Appeals in one Circuit to hear an appeal identical in its fundamental aspects with an appeal which had been entertained by a Circuit Court of Appeals in another Circuit disclosed a conflict of opinion between Circuits in a matter of great public importance that ought not to exist. To correct this a writ of *certiorari* seemed appropriate.

But this Court nevertheless denied the Petition of Darragh A. Park for such writ by Order entered March 12, 1945.

Since the adverse action upon the Petition for the writ of *certiorari* was taken by this Court a decision has been rendered by the Circuit Court of Appeals in the Tenth Circuit reversing the Order and Decree of the District Court for the District of Colorado and referring back to the

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* *Ecker et al.* v. *Western Pacific Railroad Corporation, et al.*, 318 U. S. 448; *Group of Institutional Investors et al.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523.

Interstate Commerce Commission the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company for further proceedings in accordance with Subsection (e)—*i. e.* for a new Plan.

The proponents of the old Plan which has been condemned by the Circuit Court of Appeals for the Tenth Circuit have informed your Petitioner's counsel that it is their purpose to apply to this Court for a writ of *certiorari* to review that decision and that the papers are in course of preparation for prompt filing. If this Court shall determine to grant a writ of *certiorari* to review the decision so rendered by the Circuit Court of Appeals in the Tenth Circuit it may deem it appropriate in the interest of uniformity in the administration of justice to reconsider its refusal to grant such writ to review the decision of the Circuit Court of Appeals in the Seventh Circuit.

While there may be minor points of differentiation it will be impossible to avoid the conclusion that in all points of substance which are really fundamental the two cases are identical and this is also true of most if not all of the seventeen cases now pending under Section 77 of the National Bankruptcy Act.

Either all of the cases are right or all are wrong *fundamentally.*

In *point of fact* we now know that all of these are wrong. The Judiciary Committee of the House of Representatives a Committee enjoying an exceptional measure of public confidence have formally reported to the House of Representatives and the House of Representatives with but a single dissenting vote has accepted and approved their Report, the substance of which is that this Court has misapprehended and misinterpreted Section 77 of the National Bankruptcy Act. The Judiciary Committee says with the candor permissible from a body of its stature and status under the federal Constitution that this Court has con-

verted an Act of Congress designed as one for the "Relief of Debtors" into a statute under which a Debtor's equity may be taken from the owners by *fiat* of an administrative Board without the kind of judicial review contemplated by the Congress. Certainly no one will gainsay that the Judiciary Committee knows *in fact* what was intended by legislation which it formulated.

In *point of law* there may be a question whether this Court was justified in reaching the wrong result which indubitably it did reach by reason of the use in the Statute itself of inept or inartistic language. It may be conceded that the Statute is not wholly free from ambiguity. Few complicated Statutes ever attain such a standard of perfection. If, however, an opportunity be afforded by the granting of a rehearing upon and the issue of a writ of *certiorari* under the Petition of Darragh A. Park herein dated January 25, 1945, we feel confident that we can convince this Court to its own satisfaction that its misinterpretation of Section 77 was not the result of faulty draftsmanship fairly attributable to Congress but was due to its own failure to give adequate weight to establish canons of statutory construction.

We recognize that a rehearing upon a Petition for a writ of *certiorari* is rarely granted and then only in exceptional circumstances. But we feel that this case is definitely in the category of exceptional cases. It is but one of the seventeen proceedings that are pending in the Interstate Commerce Commission and in the Courts under Section 77 of the National Bankruptcy Act. The District Courts and the Circuit Courts of Appeals are governed in all of these cases by the interpretations placed upon the National Bankruptcy Act by this Court, which interpretations the Judiciary Committee says are wrong and which as is evident certain of the Circuit Courts of Appeals think should be reconsidered.

The Circuit Court of Appeals in the Seventh Circuit seems to be quite clearly of the opinion that this Court erred in permitting the Interstate Commerce Commission to alter property rights by moving backward and forward the effective date of a Plan of Reorganization. The Opinion of that Court written by Circuit Judge MAJOR in which that view is expressed is annexed as Appendix A to the Petition herein dated January 25, 1945. If and when the Petitions for writs of *certiorari* are presented to this Court seeking a review of the decision of the Circuit Court of Appeals in the Tenth Circuit in the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company the full Opinions rendered by Judges HUXMAN and PHILLIPS will be furnished; but we annex hereto as Appendix A to this Petition for rehearing the concurring Opinion of Circuit Judge PHILLIPS.

From what is said by Judge PHILLIPS and from his excerpts taken from the Report of the Judiciary Committee of the House of Representatives it is clear that the situation created by the decisions of this Court rendered March 15, 1943 is a grave one which this Court may itself undertake to remedy.

The Petitioner respectfully urges that conditions have so changed and our prospectives have so widened since this Court acted adversely on the Petition herein for a writ of *certiorari* as to justify reconsideration of railway reorganization problems regardless of whether a writ of *certiorari* is asked or granted to review the recent decision of the Circuit Court of Appeals for the Tenth Circuit. If, however, this Court shall determine to review that decision as a base for a reconsideration of the two decisions rendered March 15, 1943 it would seem to follow that the Petitioner is entitled to a rehearing upon his Petition for a writ of *certiorari* almost as a matter of course.

WHEREFORE, the petitioner respectfully prays that this Court pursuant to Rule 33 grant a rehearing of his Petition for a writ of *certiorari* filed herein on January 25, 1945, and that a writ of *certiorari* be issued in accordance with the prayer of said Petition.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
*Attorney for Darragh A. Park, as Chairman of a Group of Holders of the Debtor's Adjustment Mortgage Bonds,*
40 Wall Street,
New York 5, New York.

June 7, 1945.

## Certificate of Counsel

I, FRANK C. NICODEMUS, JR., attorney and counsel herein for Darragh A. Park, as Chairman of a Group of Holders of the Debtor's Adjustment Mortgage Bonds, do hereby certify pursuant to Rule 33 that the foregoing Petition for rehearing is presented in good faith and not for delay.

FRANK C. NICODEMUS, JR.

June 7, 1945.

## APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS

TENTH CIRCUIT

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Nos. 2906, 2907, 3106, 3107 and 3108—NOVEMBER TERM, 1944.

| | |
|---|---|
| In the Matter of<br>The Denver and Rio Grande Western Railroad Company, a corporation, Debtor.<br>The Denver and Rio Grande Western Railroad Company, a corporation, Debtor,<br>Appellant,<br>*vs.*<br>Insurance Group Committee, *et al.*,<br>Appellees. | Appeals from the United States District Court for the District of Colorado. |
| The Denver & Salt Lake Western Railroad Company, a corporation, Debtor,<br>Appellant,<br>*vs.*<br>Insurance Group Committee, *et al.*,<br>Appellees. | Appeals from the United States District Court for the District of Colorado. |
| City Bank Farmers Trust Company, a corporation, as Trustee under the General Mortgage, February 1, 1924, of The Denver and Rio Grande Western Railroad Company,<br>Appellant,<br>*vs.*<br>Insurance Group Committee, *et al.*,<br>Appellees. | Appeals from the United States District Court for the District of Colorado. |

| | |
|---|---|
| The Denver and Rio Grande Western Railroad Company, a corporation, Debtor; and The Denver & Salt Lake Western Railroad Company, a corporation, Subsidiary Debtor, Appellants, *vs.* Insurance Group Committee, *et al.*, Appellees. | Appeals from the United States District Court for the District of Colorado. |
| Guy A. Thompson, as Trustee of the Missouri Pacific Railroad Company, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees. | Appeals from the United States District Court for the District of Colorado. |

[May 10, 1945]

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges

PHILLIPS, Circuit Judge, concurring:

The broad language of the Supreme Court in the Western Pacific case and the Milwaukee case[1] compels me to conclude that we cannot disturb the Commission's finding of valuation nor the finding of the Commission, confirmed by the trial court, that the equities of the unsecured creditors and the preferred and common stockholders have no value. Nevertheless, I feel impelled respectfully to suggest that the elimination of a substantial portion of the claim of the holders of the general mortgage bonds and all of the claims of stockholders and unsecured creditors, on the basis of a valuation resting wholly on an estimate of

[1] Ecker *v.* Western Pacific R. Corp., 318 U. S. 448; Group of Investors *v.* Milwaukee R. Co., 31 U S. 523.

future earnings, is harsh treatment of such claims. I say this because, while according expertness to the Commission, it is my opinion that such future earnings cannot be estimated with a degree of certainty that is not likely to result in grave injustice.

The injustice to junior security holders which may result from a valuation based solely on an estimate of future earnings has aroused the attention of Congress and corrective legislation has been introduced. H. R. 4960 has already passed the House and is pending before a Senate Committee.[2]

On November 1, 1935, during the depths of the national depression, the debtor came into court for reorganization.

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[2] The House Judiciary Committee, in its unanimous report (78th Cong., 2d Sess., Report No. 1615) recommending passage of H. R. 4960, in part said:

"The purpose of the bill is to correct a very serious situation arising from the interpretation placed by the Interstate Commerce Commission and the courts upon the amendments of section 77 enacted by the Congress August 27, 1935. We believe this situation results from a misapprehension of the intention of Congress with respect to the 1935 amendments. The consequences have been and are so disastrous to railroad investors, and so dangerous to the credit of the railroads in general, that they should be corrected by legislation.

"From a legal standpoint, the problem may be stated simply. Section 77 was directed primarily to the relief of financially embarrassed railroad companies through a revision of their capital structures and a reduction of fixed charges. It does not expressly provide for any reduction in the existing total capitalization; but the Interstate Commerce Commission has interpreted paragraph (d) of the section as authorizing it to fix the total capitalization of the reorganized company. In so doing, it has estimated a 'capitalizable value of the assets' of the property based almost entirely upon 'earning power'—earning power of the property, past, present and prospective—as these words are used in section 77(e). Its estimates of prospective earning power are necessarily speculative. Nevertheless it has used its estimates of earning power to fix capitalizations in all cases very substantially below the existing capitalizations, regardless of the investment in the property and of the valuation previously determined by the Commission under section 19a of the Interstate Commerce Act. The Supreme Court in passing upon two major reorganization plans—the Western Pacific and the Chicago, Milwaukee, St. Paul & Pacific—upheld the Commission in this interpretation of the section, and has further held that the Commission's findings will not be disturbed where there is some evidence to support them. In other words, these administrative findings are beyond judicial review.

"The result of this interpretation of the statute by the Commission, and the subsequent refusal of the courts to review the Commission's findings, has caused the destruction of hundreds of millions of dollars of railroad securities representing actual investment in the property

At that time the debtor's senior debts ahead of the general mortgage bonds aggregated slightly over $101,000,000 and the claim of the general mortgage bondholders aggregated about $30,000,000. With an immediate reorganization, a capitalization of $132,000,000 would have been adequate to give the general mortgage bondholders new stock equal to 100 per cent of their claim. No capitalization or valuation ever proposed for the debtor, in any plan presented, has

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made, to some extent at least, in reliance upon the belief that such investments could not be confiscated except by due process of law.

* * * * * *

"In five major companies now undergoing reorganization, the reductions in capitalization aggregate some $600,000,000, meaning that this amount of railroad securities has been eliminated in the reorganization of these five companies alone, although there is no question that the investment in road and equipment and the 19a valuations at the present time are far in excess of the capitalization determined by the Commission. The same is true generally of the other roads involved in reorganization, these five being specifically mentioned, because they are included in one exhibit submitted to this committee by the Interstate Commerce Commission (hearings on H. R. 2857, serial No. 9 p. 199).

"That this situation has created an unbearable hardship upon the junior investors in railroad securities and constitutes a real danger to railroad credit may be easily seen from a glance at current railroad earnings. In 1942 the Missouri Pacific earned $32.67 a share on the common stock outstanding under the old capitalization; the Denver & Rio Grande Western, $34.40 a share; Rock Island, $25.11; Frisco, $18.03; St. Louis Southwestern, $27.23. These figures approximately were repeated in 1943, and the high earnings are continuing in 1944. Yet these stocks, which have demonstrated such an earning power, have been absolutely wiped out in reorganization, and the stockholders are without remedy. Moreover, the junior securities of all these roads have been drastically cut in reorganization and the senior securities have been very largely converted into income bonds and preferred and common stock. In one case, the Commission estimated a normal earning power of $11,000,000, and based its capitalization upon that figure; yet in the same year in which the Commission's plan was announced (1941) that road earned more than $18,000,000. In 1942, it earned $36,000,000, and in 1943 $37,000,000. Nevertheless the Commission still says the old common stock is worthless. The stockholders are without remedy. There is in practical effect no judicial review of the action of the Commission. Although its guess as to future earning power has been demonstrated to be wrong, its findings are final.

* * * * * *

"The primary purpose of the bill is to insure that the courts shall make an independent judicial review of each plan and of the evidence upon which the plan is based. Under the existing statute, the Commission is required to certify to the court a transcript of its proceedings; and the court is required to notify all parties and, if objections are filed, to have a hearing. The effect of the proposed amendments is to require the judge to make an independent judicial determination of the facts

been that low. During the eight years' delay in reorganization (in nowise due to the general mortgage bondholders, but, at least in part, to controversies among the senior security holders) and up to January 1, 1943, the effective date of the plan, the claims of the senior security holders, due to the accrual and nonpayment of interest, increased about $38,000,000. The debtor's net income available for interest during the trusteeship to the end of 1944 amounted to $49,420,972. It exceeded by approximately $9,500,000 the interest charges which accrued on the claims of senior security holders to the end of that year. As of December 31, 1935, the debtor's current assets were $9,727,230 less than its current liabilities. As of December 31, 1944, the debtor's current assets exceeded its current liabilities by $12,125,863.50. Thus, it will be seen there has been a favorable change in the current situation of $21,853,093, and, moreover, since the plan was formulated, the Junction Bonds have been paid and equipment obligations have been reduced from $5,758,000, the amount provided for in the plan, to $4,540,000, a reduction in that requirement of $1,218,000.

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found by the Commission, and not to hold that the administrative finding of the Commission is beyond judicial review. With this object in mind, the bill provides that the judge shall not only be satisfied that the plan complies with the provisions of subsection (b) as in the present statute, but must also be satisfied that it complies with the provisions of subsection (d), which the Supreme Court held was not within the province of judicial review. This will add nothing to the requirements of the present statute as to the hearing and the scope of the evidence; it will merely direct the courts to exercise the traditional right of review, and to give the parties and the public the benefit thereof.

"Second, and as a means of insuring that the Interstate Commerce Commission shall be guided by some standard in determining the permissible capitalization of the reorganized company, the bill provides that the existing total capitalization shall not be reduced below the lower of either the investment in the property or the physical valuation as previously determined by the Commission under section 19a. Naturally, if the existing capitalization exceeds the investment, it should be susceptible of reduction, if the Commission finds it is not supported by earning power; or, if the existing capitalization exceeds the physical valuation found by the Commission, it should be susceptible of reduction, unless in that event the Commission deems the earning power sufficient to support it. But where the existing capitalization represents actual investment in the property, or where it is not in excess of the value determined by the Commission under the mandate of law, then it should not be disturbed."

Approximately $43,000,000 of the income available, but not used, for the payment of interest has been expended in permanent improvements and betterments. While the investment value of the debtor's property thus was substantially increased, the Commission's valuation, based on estimated future earnings, was not increased proportionately. As a result, the claim of the senior security holders has increased and the participation of the general mortgage bondholders has been pressed downward until it is now fixed at 10 per cent of the new common stock. Many of the improvements and betterments referred to above, have substantially increased the capacity of the railroad to handle increased traffic as it arises. Central train control installed in many segments, where the greatest density of traffic obtains, gives to those segments, in a large degree, the equivalent of a double-track railroad and increases the number of trains that can be operated over the road and the volume of traffic that can be handled by the road. Other of such improvements have contributed to efficiency and economy in operations. These improvements have enabled the debtor to handle the great increase in traffic resulting from the war effort and have placed the debtor in a position to more economically and efficiently handle a volume of traffic largely in excess of its prewar traffic, should future economic conditions produce such traffic. Under the plan approved and confirmed by the district court, 90 per cent of the common stock goes to the holders of the senior securities and 10 per cent to the general mortgage bondholders. As a result, should there be a substantial increase in the debtor's postwar traffic over its prewar traffic, 90 per cent of the increased earnings will inure to the benefit of the holders of the senior securities and only 10 per cent to the general mortgage bondholders, whose claim was decreased 90 per cent by reason of the failure to discharge interest accruals with income available therefor and the diversion of such income to the cost of such permanent improvements. It seems to me, under all these circum-

stances, that, in addition to the other adjustments required to make the plan fair and equitable, the Commission should endeavor to modify the plan so as to give relief from the situation that lets the full impact of the improvement program fall upon the claim of the general mortgage bondholders and accords them no corresponding benefits.

By confirming the finding of the Commission that the equities of the unsecured creditors and the stockholders are without value, based on an estimate of future earnings, an estimate at best shrouded in uncertainty, the court, by judicial fiat, has forever forfeited and destroyed the rights and interests of such creditors and stockholders in the assets of the debtor, a result which, under well-settled principles, a court of equity will ordinarily avoid.

It may be urged that the elimination of the stock will provide the debtor with a stronger financial structure and enable it to better serve the public interests, but private property cannot be taken in the public interest without just compensation.

Even if viewed solely from the standpoint of future earnings, it would seem that it should not be said such stock is without value merely because, during periods of receding economy and depression, the earnings of the debtor will not be sufficient, after payment of prior claims, to provide funds from which dividends on such stock can be properly paid. Such stock has value, if, during periods of expanding economy and prosperity, the earnings of the debtor will be sufficient to provide for prior claims and leave a surplus from which substantial amounts can be lawfully paid as dividends thereon; and a finding of no value should not be made if there is reasonable probability that earnings will be realized from which substantial dividends can be paid, even though only during periods of economic prosperity.

It seems to me, under the facts presented on this record and those of which we may take judicial notice, that it is not unlikely the estimate of future earnings of the debtor made by the Commission will fall far short of its actual future earnings. Should the estimated earnings prove to be substantially under the actual earnings, the injustice that will result to the holders of the general mortgage bonds and to the stockholders of the debtor is obvious.

It may be reasonably assumed that a substantial portion of the war industries contributing traffic to the road will be succeeded by permanent industries. For example, it is common knowledge that the Kaiser Industries and one of the large Eastern steel companies have indicated a desire to acquire and continue the operation of the Geneva Steel Plant, a large and modern steel plant built on the debtor's line of railroad. In the areas tributary to debtor's line of railroad, there is an abundance of cheap power and of fuel and ore. Many heavy traffic-producing enterprises have been and are being established in new areas tributary to the debtor's line of railroad. It is reasonable to believe that this industrial development will continue.

Furthermore, changes in national income at constant prices have an approximately constant relationship to changes in ton-miles of traffic. It may be said, in general, that traffic is so related to national income that when that income rises by one billion dollars, traffic rises by about 6.6 billion ton-miles. Certain federal agencies have made estimates of the national income for the years 1947 to 1949. These estimates predict a national income of approximately 135 billion dollars in 1947 and a rising national income in 1948 and 1949, reaching 150 billion dollars in the latter year.[3] This would indicate a postwar railroad traffic reaching in 1949 a level of that traffic during 1943.

[3] See Post-War Traffic Levels, prepared by Spurgeon Bell, Head Transport Economist, and L. E. Peabody, Principal Transport Economist, of the Interstate Commerce Commission, pp. 42-71, 90-114

Moreover, the ratio between ton-mile revenue of Class I railroads and the number of factory workers engaged in the production of durable goods is fairly constant. It is 100,000 revenue ton-miles for each factory worker. That there will be a determined effort to provide jobs for upward of 55 million workers early in the postwar period is a well-known fact. This indicates a greatly increased postwar railroad traffic. Moreover, the record demonstrates that, with the exception of a slight dip in 1923, the debtor has been securing a constantly increasing proportion of the operating revenues of Class I railroads. If the debtor should enjoy postwar earnings approximating its 1943 earnings, it is clear that the valuation found by the Commission should be substantially increased. But, as suggested above, it is my conclusion that only through corrective legislation or a more liberal attitude on the part of the Commission can the junior security holders obtain relief.